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ABSTRACT

An understanding of evidence is necessary for effective rhetoric, especially in the sub-area of argumentation. Evidence can be classified according to (1) the argument field in which it is used (court of reason or court of law); (2) the linkage to the assertion being made (direct or circumstantial); and (3) its persuasive force (how convincing it is). In a court of reason, evidence is defined as data external to the rhetor. Evidential input consists of testimony which is channeled in various ways (e.g., from an individual's newspaper, television, or doctor) to ad hoc groups of receivers who must make deliberative judgments. Courts of law define evidence as probative matter legally presented at the trial of an issue. Evidential input is mostly direct evidence channeled through judges to carefully selected groups of receivers who must make either deliberative or forensic judgments. Because of these fundamental differences the same argument which convinces the jurors of a man's innocence in a court of law may be used as evidence of his guilt by a court of reason. (Forty-three footnotes are attached.) (MHC)

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A TAXONOMY FOR THE CLASSIFICATION OF EVIDENCE

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The intrinsic relationship of evidence to that particular area of rhetoric known as argumentation is axiomatic. It is indicated in that long standing dictum "s/he who asserts must prove" as well as in the literature.[1] It is a virtual given that evidence and the theories which govern the evaluation of evidence are some of the most important aspects of argumentation and debate.[2] Evidence is even commonly defined as the raw material of argumentation or similarly, the supporting material upon which an argument is based.[3] Since evidence is so important an aspect of rhetoric, the more the rhetor understands about its fundamental nature and interrelationships, the higher the quality of the discourse which can be achieved. In short, an understanding of evidence is a sine qua non for effective rhetoric and its sub-area, argumentation. Therefore, the purpose of this essay is to promulgate a taxonomy for the classification of evidence and to apply appropriate elements of this taxonomy to a discussion of argument fields.

Evidence has been classified in a variety of different ways according to numerous different criteria. These various classification schema produce many different labels representing the kinds and types of evidence available to an advocate. To help bring a modicum of order to this welter, I propose to classify evidence according to three non-mutually exclusive criteria: (1) the field in which the evidence is used, (2) the linkage to the assertion under consideration, and (3) the suasive force of the evidence.

The Field in which the Evidence is Used

Evidence can be classified according to the field in which it is used. Authorities as diverse as Joynt, Newman, Newman, Rescher, and Toulmin[4] have indicated that there are at least two major argument fields, each of which can have sub-areas: (1) the courts of reason and (2) the courts of law.[5]

The court of reason is the arena for the rhetor who would engage in the rational promulgation and evaluation of non-legal argumentation. Previously, some simple definitions of evidence as used in the court of reason have been indicated. Now, I would define evidence from the court of reason more thoroughly and as follows: Evidence consists of those data, external to the rhetor (Thus, for the purpose of analysis only, evidence can be considered separately from reasoning and/or ethical appeal. One should remember, however, that, in actuality, reasoning and/or ethical appeal can be a form of backing for an assertion and, therefore, practically speaking, can be considered as evidence.) that are intended to induce a sense of belief in the proposition(s) or assertion(s) which the data purportedly support.

Fundamentally, there are three types of data external to the rhetor which constitute the three basic kinds of evidence used in the court of reason: (1) testimony, (2) statistics, and (3) examples. Each of these species of evidence is subject to two basic tests in the court of reason: (1) the ability of the evidence to tell the truth and (2) the willingness of the evidence to tell the truth.[6] Ability to tell the truth may be defined as the capacity or capability of a particular piece of evidence to enunciate that which the data, when it is interpreted correctly, obliges one to believe. Similarly, willingness to tell the truth may be defined as

the desire of a particular piece of evidence to enunciate that which the data, when it is interpreted correctly, obliges one to believe.

In contrast to the court of reason stands the court of law, wherein evidence has been defined as:

> Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.7 (Emphasis mine.)

The phrase "legally presented at the trial of an issue" is important as it emphasizes one of the major aspects of evidence in legal proceedings -- admissibility. Admissibility is such an important part of legal evidential theory that the definitions of evidence routinely include it as a major characteristic. For example, legal evidence has been defined as, "...that statement made under oath before a properly constituted tribunal or officer...legal evidence...is admissible evidence."[8]

There are at least four basic categories of legal evidence: (1) documentary or written, (2) oral, (3) real, and (4) demonstrative. The differences between documentary and oral evidence have been discussed in Curtis v. Bradley:

> "Legal evidence" is not confined to the human voice or oral testimony, but includes every tangible object capable of making a truthful statement; such evidence being roughly classified as "documentary evidence." In oral evidence the witness is the man who speaks; in documentary evidence the witness is the thing that speaks. In either case the witness must be competent--that is, must be deemed competent to make a truthful statement--and in either case the competency of the witness must be proved before the evidence is admitted; the difference being that in oral evidence the competency is proved by a legal presumption, and in documentary evidence the competency must be proved by actual testimony, and the further difference that in oral evidence the credit of the witness is tested by his own cross-examination, while in documentary evidence the credit of the witness is tested by the cross-examination of those who must be called to

prove its competency.[9]

Real evidence, as distinguished from documentary, or oral evidence, is:

> ...furnished by things themselves, on view or inspection, as distinguished from a description of them by the mouth of a witness; e.g., the physical appearance of a person when exhibited to the jury, marks, scars, wounds, fingerprints, etc., also the weapons or implements used in the commission of a crime, and other inanimate objects, and evidence of the physical appearance of a place (the scene of an accident or of the commission of a crime or of property to be taken under condemnation proceedings) as obtained by a jury when they are taken to view it.[10]

In contrast to real evidence, demonstrative evidence is: "That evidence addressed directly to the senses without intervention of testimony."[11]

The noted attorney, Melvin Belli, who has been labeled "the King of Torts," describes his first use of demonstrative evidence and gives a good example of its persuasive impact in his autobiography My Life on Trial wherein he notes that it is not always possible to use real evidence, for example, the knife which may have been used to threaten or attack someone. Therefore, an attorney might use dozens or even hundreds of similar knives used in similar assaults. The jury seeing the knives will be influenced to a greater extent than if they did not view weapons. Seeing the knives concretizes the reality of the alleged attack, thereby increasing persuasive impact.[12]

There are two basic tests of evidence in the court of law: competency and admissibility. In defining and discussing competency, Black's Law Dictionary states that it constitutes:

> The presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give testimony in a court of justice; --applied in the same sense, to documents or other written evidence.[13]

Black's continues:

> Competency differs from credibility. The former is a question which arises before considereing the evidence given by the witness; the latter concerns the degree of credit to be given to his story. The former denotes the personal qualification of the witness; the latter his veracity. A witness may be competent, and yet give incredible testimony; he may be incompetent, and yet his evidence, if received, be perfectly credible. Competency is for the court; credibility for the jury. Yet in some cases the term "credible" is used as an equivalent for "competent." Thus, in a stature relating to the execution of wills, the term "credible witness" is held to mean one who is entitled to be examined and to give evidence in a court of justice; not necessarily one who is personally worthy of belief, but one who is not disqualified by imbecility, interest, crime, or other cause.[14]

In contrast to competency, admissibility "...means that it [the evidence] is of such a character that the court or judge is bound to receive it; that is, allow it to be introduced."[15]

In actuality, admissibility rules have been established to deal with the issue of competency. For example, hearsay evidence[16] is usually not admissible, the reason being that, over the years, hearsay evidence has been found to be so lacking in competency that the law has created a presumption against its use.[17] However, there are exceptions. There are times when hearsay evidence can be admitted into the court of law. However, in order to obtain the admissibility of hearsay evidence, the presumption against its use has to be argued against by counsel, and this argumentation has to be accepted by the judge. (Argumentation which has consistently led to the admission of hearsay evidence has helped to create a category known as exceptions to the hearsay rule e.g., admission by an opposing party, dying declarations, statements in ancient documents, learned treatises, startled utterances, etc.) Indeed, when one studies evidence in law school, one studies issues of admissibility such as the

hearsay rule and its exceptions.[18]

The Linkage to the Assertion

The court of law originally gave rise to an evidential classification which subsequently has been adopted for use in the court of reason. In both fields, the terms circumstantial and direct evidence are used. Indeed, the classification of evidence as direct and circumstantial is presently the major standard in use in the court of law, other categories of evidence such as documentary or written, oral, real, and demonstrative, frequently being subsumed under it. The terms direct and circumstantial indicate the linkage of the evidence to the assertion under consideration. In the case of direct evidence, the linkage is direct. In the case of indirect, or circumstantial evidence, the linkage is not so direct. In fact, an inferential leap is required to tie the evidence to the assertion. Numerous similar definitions of circumstantial and direct evidence have been propounded. A typical one which delineates the difference between these two types of evidence is found in Radomsky v. U.S.:

> "Circumstantial evidence" is that which establishes a fact only through inference based on human experience, that certain circumstance is usually present when another certain circumstance or set of circumstances is present, while "direct evidence" establishes fact without necessity for such inferences.[19]

To illustrate: A full set of fingerprints from "Miami" Mike's right hand on the grip of a Bren-10[20] would be direct evidence that "Miami" Mike held that gun. A bill of sale, cancelled check, receipt, registration, and permit would all be direct evidence that Mike owns that gun. A ballistics test proving that Mike's gun was used to kill Sam would be direct evidence of that fact. A positive paraffin test would be direct evidence that Mike recently shot one or more guns. All of the above would be direct evidence

regarding Mike's relationship with guns. Also, all of the above would be circumstantial evidence that "Miami" Mike shot Sam. However, it would be only circumstantial evidence, only this and nothing more.

What the auditor(s) know and what the auditor(s) conclude as a result of this knowledge are two completely different things. All the auditor(s) know are the following facts: (1) Sam is dead. (2) He was killed with Mike's gun. (3) The only fingerprints on Mike's gun are Mike's. (4) Mike recently shot one or more guns (of some type). What the auditor(s) conclude after learning of these facts is an inference, in essence an educated guess. How educated the guess depends on how probative the evidence and how intelligent the auditors. However, to conclude that Mike killed Sam knowing only the previously presented facts would require a lengthy inferential leap. More proof is needed in order to shorten the distance of the leap and thereby reduce the chances of error. The rhetor will need more evidence in order to persuade the auditor(s) that they should make a logical connection between the terms Sam's killer and "Miami" Mike.

Furthermore, depending on the court in which this case is heard, the auditor(s) will have to make this logical connection beyond any reasonable doubt and to a moral certainty (court of law - criminal standards), or by a preponderance of the evidence, no matter how slight that preponderance might happen to be (court of law - civil standards), or to any point between these two ends of the continuum (court of reason - ad hoc standards). Thus, the amount and persuasive force of the additional evidence needed to prove that Mike killed Sam would vary in accordance with the requirements of the court in which the case is heard. Notwithstanding

this fact, more evidence is needed to make a reasoned connection between the terms Sam's killer and "Miami" Mike. This additional evidence could be direct or it could be circumstantial; both types of evidence can be used, even exclusively, to prove a case in either the court of reason or the court of law.

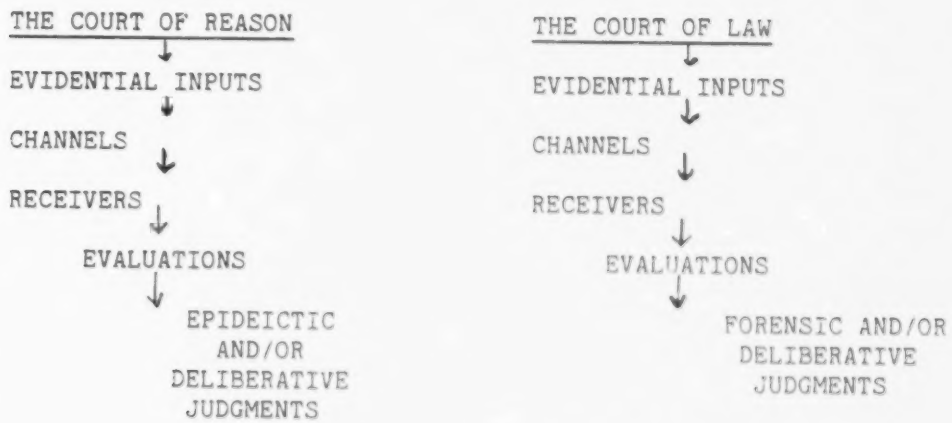
The Suasory Force of the Evidence

The final and simplest classification or evidence to be considered involves the suasory force of the evidence. Historically, the mainstream of rhetoric has been persuasion or advocacy. In fact, as Robert P. Newman has observed, "The business of rhetoric is persuasion."[21] In order to persuade, rhetors need to use evidence which is persuasive. Evidence can be thought of as being on a continuum. Evidence which is absolutely non-convincing can be placed at one end; evidence which is absolutely convincing can be placed at the other end. Convincing evidence can be defined by the following axiom: The greater the sense of belief induced in the proposition(s) or assertion(s) which the data purportedly support, the more convincing the evidence. The less the sense of belief induced in the proposition(s) or assertion(s) which the data purportedly support, the less convincing the evidence. Thus convincing evidence is that which sways or influences a receiver in the direction desired by the rhetor. Therefore, an understanding of the nature of evidence, its classifications, interrelationships, and functions, is essential for consistent success on the part of any rhetor.

Argument Fields

In addition, an understanding of evidential theory is important to an understanding of argumentation theory as evidence is often a major

determinant of an argument field. As has been indicated, two of the main fields in which argumentation is used have been labeled the courts of reason and law. There are vast and fundamental differences between the processes which take place in the court of reason and the processes which take place in the court of law, and it is toward a consideration of these major differences that this section is addressed. To better reveal these differences the following model can be postulated:



While the labels for the components of each model are almost identical, the functions of the components are often quiete disparate. In order to more easily understand these differences each component of the model will be examined separately beginning with the first, and perhaps most important, aspect of the process: evidence. In both the courts of reason and law, evidential inpust normally begin the decision making process. However, the types of evidence employed vary: the court of reason relies, in the main, on testimony, the court of law -- direct evidence.

In the court of reason, we normally know what we know through testimony which is, hope[illegible]y, authoritative or expert. When our automobile does not run well we take it to a mechanic. When the mechanic,

after examination, says: "it looks to me like a blown head gasket and if it is, it'll cost you around $275.00 or so for me to fix it," few of us have the necessary expertise to verify or challenge this conclusion. Instead, most of us pretend that we understand the language of "mechanicese"and that we know what s/he is talking about. As lay persons, we have essentially two choices: believe and let the mechanic fix the car, or disbelieve and try to take the car elsewhere. Few of us have the time, money, or inclination to become mechanics in order to repair the vehicle ourselves. Similarly, when we are sick we consult a physician. We can either believe what our doctor tells us or see another doctor. Few of us are going to attend medical school in order to acquire the expertise needed to verify or challenge our physician's conclusions. This is the way of the court of reason. We know most of what we know, not through first hand experience or direct evidence, but because someone has told us.

In contrast, the court of law relies heavily, if not primarily, on direct evidence. To wit: the prosecutor brings in a gun and a body. The prosecutor supplies evidence, registrations and the like, to prove that this is Mike's gun. The prosecutor supplies evidence which establishes that Mike's fingerprints, and only Mike's fingerprints, are on the gun. The prosecutor supplies evidence which proves that Mike's gun was the weapon used to kill Sam. The prosecutor supplies evidence which proves that the body is (a) dead and (b) Sam's. At this juncture, the state is well along the way toward establishing a <u>prima facie</u> case that Ralph killed Sam. The lynch pins in this case are the pieces of evidence which directly involve "Miami" Mike with the weapon which killed Sam.

Not only is direct evidence emphasized in the court of law, but much of the "authoritative" testimony used in the court of reason would not be

admitted into the court of law. It would be rendered inadmissible -- excluded as hearsay. Depending on the facts of the case, for instance, you cannot tell the court that your automobile has a blown head gasket (objection--conclusion), or that your mechanic told you that your car's engine has a blown head gasket (objection--hearsay). Under the proper circumstances, the mechanic could be brought into court, sworn in, and asked if s/he told you that the engine has a blown head gasket. However, depending once again on the fact situation, the testimony would not necessarily be allowed to evidence the point that the car's engine has a blown head gasket -- only that the mechanic told you that it did. Evidential inputs, then, in the court of law are very different from those in the court of reason.

Compounding these differences are the channels through which the evidence is directed toward its receivers. In the court of reason, the evidence may be presented directly to the receivers or it may be mediated. Thus the channels are either unmediated (direct) or mediated. Much of the evidence we receive in the court of reason is mediated. We read of an accident at a nuclear powerplant in the Soviet city of Chernobyl in Time magazine. We read our local newspaper and discover that the county Sheriff has been arrested on charges of criminal bribery. We hear that Mike was convicted of the slaying of Sam on the radio. We watch the local news on television and learn more concerning this conviction. However, much of the evidence we receive in the court of reason is, at least largely, unmediated. Our communications with our lawyers, doctors, and automobile mechanics as well as with our butchers, teachers, bankers, pharmacists, and

others of similar nature are reasonably direct. Thus, the evidence which we receive from them in form of "authoritative" testimony is unmediated. Not so in the court of law. Here all of the evidence is mediated -- mediated by the court and through the court under the auspices of the court i.e., the judge(s).[22] No evidence is admissible into the court of law unless and until the judge(s) allow it to be admitted. Judge(s) can and do exclude evidence for a variety of reasons.[23] Whereas in the court of reason the receivers are reasonably open to virtually all forms of evidential input, indeed the receivers are dependent upon the judge(s) for the evidence which they will receive. Furthermore, not only can judge(s) exclude evidence, they can, by such procedures as the taking of judicial notice,[24] include evidence and/or give greater probity to evidence which they may choose to admit. The judge(s) in the court of law then function as gate keepers, systematically admitting and excluding evidence from the consideration of the receivers.

Channel differences account for the major epistemological disparities in evidential theory in the courts of reason and law. In the court of reason, receivers are exposed to vast inputs of information. As consumers of rhetoric, they are frequently bombarded by evidence. The major factors which limit their evidential inputs can be viewed as being psychological in nature, for example, selective attention, selective perception, selective retention, and selective evaluation. Thus, in the court of reason, almost all evidence is admissible, therefore, the receiver must be capable of evaluating it. Unlike receivers in the court of law, receivers in the court of reason do not have the judge(s) to guide them. In the court of law, the judge(s) govern the admission of evidence, in the court of reason, it is the receivers who do so. Thus, as has been indicated, evidential theory in the court of law involves, in the main, issues of admissibility,

whereas evidential theory in the court of reason calls on the receivers to evaluate the evidence themselves and is not therefore fundamentally concerned with admissibility (as basically all evidence can, theoretically at least, be admitted into the court of reason) but rather with the ability and willingness of the evidence to tell the truth, thereby mooting the issue of admissibility.

Receivers in the courts of reason and law serve essentially similar functions. Their role is to process and evaluate the evidence with a view toward decision making judgments. Receivers in both arenas are thus engaged in what could be very loosely termed hypothesis formulation, testing, adoption, or rejection. The differences are in how the receivers came to be in the courts and the degree of rigor involved in the evidential evaluation and decision making present in each court.

Receivers come into the court of reason on a self-selecting or ad hoc basis. Some are there because they decide to be. Some know where they are and what is expected of them. Others may only occasionally enter the court of reason and, upon arrival, have little knowledge of where they are or what their role is.

In contrast, receivers enter the court of law because they are summoned. Few individuals like to wile away the hours watching courtroom proceedings. Indeed, many of those called for jury duty try to get excused -- some successfully. Those who remain, however, are there because they were called, not because they volunteered. Whereas almost anyone can enter and participate in the court of reason, only those called and selected can enter and participate in the court of law. The selection process excuses many of the jurors who are called. Officers of the court will dismiss,

either for cause or preemptorially, jurors whom they think will render an unfavorable judgment. Thus, unlike the receivers in the court of reason who are self-selected or are selected on an ad hoc basis, the receivers in the court of law are examined, evaluated, and theoretically, at least, carefully selected.

Just as the selection process which determines the receivers of each court varies, so too does the mental rigor with which each group of receivers is expected to perform.

In the court of reason, performance expectations vary as to the situations and circumstances. Greater mental wherewithal regarding the ongoing Middle East crisis should be expected from a policy analyst/decision maker employed by the Rand Corporation than from an instructor in political science 101 at Somewhere Community College. More sophisticated consumer decision making should be expected of the researcher employed by Consumer's Union than by Harry and Harriet Homemaker. Not withstanding this variance, however, receivers in the court of reason are all engaged in essentially the same task: evidential evaluations involving hypothesis formulation, testing, adoption, or rejection, i.e., decision making. The differences among receivers in the court of reason lie not in their tasks but in the ability and willingness with which they perform their tasks.

In the court of law, performance expectations of receivers are high and, unlike the court of reason, continued on-going efforts are made in order that these high standards of expectations can be met. The receivers are carefully selected, a situation which is not always possible in the court of reason. Throughout the trial, the receivers are instructed by the

judge, thereby supplying them with a known reference frame into which the evidence they are receiving can be fitted. Before the jury retires to deliberate, they receive additional instruction from the judge designed to focus the evidence and clarify the issues which have been presented. During their deliberations, the jury can ask the judge for further instructions or clarifications. Only after, and in light of, all of the above procedures does the jury make its judgment and render its verdict. Furthermore, there are instances where the court of law holds that the matters under consideration are too weighty, too complicated, too complex, even for jurors assembled under the best of the foregoing circumstances. In such situations, the court of law can choose to utilize a bench trial -- a situation which might best be described to the layperson as a sort of jury of judge(s).

The final difference to be considered lies in the nature of the judgment which the receivers of the courts of reason and law render. Typically, it is the role of receivers in the court of reason to evaluate the evidence and make a deliberative judgment. (Obviously, these are situations in which the receivers are called upon to render value judgments. Normally, however, such value judgments are made as a prelude to policy decision. For example, the decision that the right to privacy is the most fundamental of American rights carries with it certain inescapable policy considerations. On another level, even the most mundane evaluative conclusion such as, that is a beautiful necktie, indicate a propensity to engage in a policy decision, to wit: to purchase the necktie.) They must decide on the efficacy of a future course of action; they render a policy decision. In contrast, receivers in the court of law may be called upon to make either a deliberative or forensic judgment. In the latter, of course,

the jurors decide whether or not the defendant(s) committed a particular act or particular acts in the past. (In a criminal trial, such a decision would determine the guilt, or absence of guilt, of the accused. In a civil trial. such a judgment would determine which party, plaintiff or defendent, would prevail.) In the former, the court is frequently engaging in appellate advocacy and their decisions have the effect of producing policy;[25] relatively recent examples include: Brown v. Board of Education,[26] Mapp v. Ohio,[27] Baker v. Carr,[28] Gideon v. Wainwright,[29] Escobedo v. Illinois,[30] Katzenbach v. McClung,[31] Griswold v. Connecticut,[32] Miranda v. Arizona,[33] New York Times Co. v. U.S.,[34] Roe v. Wade,[35] Doe v. Bolton,[36] and U.S. v. Nixon[37]. The policy decisions thus produced can have effects equal to, or greater than, the policy decisions promulgated by the court of reason.[38]

As has been indicated, when compared with each other, the processes of argumentation which occur within the courts of reason and law can be very disparate. An example of these differences is revealed in the recent criminal trial of Guilford County, North Carolina, Sheriff James L. "Jim" Proffitt.[39] The case is interesting for several reasons, one of the least controversial, scandalous, or spectacular being that Sheriff Proffitt was being tried simultaneously in both the courts of reason and law.

In the court of law, he was accused of criminal bribery in that Proffitt purportedly had sexual relations with one Carmen Douglas in exchange for special treatment for her future husband, Ronnie Douglas, who had been a prisoner, under Proffitt's charge, in the Guilford County jail.[40]

In the court of reason, Proffitt, who was at the time of the trial a

candidate for re-election, was accused of the rather more vague charges of conduct unbecoming a Sheriff and with being unfit to hold that office.

Greensboro News and Record reporter Ed. Williams described the arguments preceding Proffitt's acquital in the court of law thusly:

> Greensboro defense attorney Robert Cahoon summed up five days of testimony in the sex-for-favors trial by telling jurors that Proffitt was only guilty of suffering from the same weaknesses as many other men who are lead astray by attractive, manipulative women.
>
> Cahoon admitted that Proffitt had had sex with Carmen Douglas, and had performed favors for jailed defendant Ronnie Douglas - Carmen's future husband. But Cahoon argued that Proffitt had not exchanged favor for sex and never had an understanding or agreement with Carmen Douglas that he would provide favors in trade for sex.41

While this argumentation led to success in the court of law, in the court of reason it led to Proffitt's characterization as a man who could not control his glands and was, therefore, unworthy to be Sheriff.[42] Thus, the kinds of argumentation which can produce success in the court of law may very well engender failure and defeat in the court of reason. These distinctions are important considerations to both the rhetor and the rhetorical critic.

Thus far, some of the major differences in the processes which occur within the courts of reason and law have been identified and explained. Although, I have not sought to argue the overall superiority of one arena over the other, I would agree with the observations of sociologist and philosopher C. Wright Mills:

> ...when there are values so firmly and consistently held by genuinely conflicting interests that the conflict can not be resolved by logical analysis and factual investigation, then the role of reason in that human affair seems at an end. ...In the end, if the end comes, we just have to beat those who

> disagree with us over the head; let us hope that the end comes seldom. In the meantime. being as reasonable as we are able to be, we ought all to argue.43

When arguing ceases and beating begins, the court of reason gives way to the court of law, a court which, in our litigious society, frequently becomes the ultimate arbiter.

NOTES

[1] For example, see: Donald P. Cushman, T. J. Larkin, and Dennis Lefebvre, "Evidence, Argument, and Form" in Advanced Debate Readings in Theory, Practice and Teaching Ed. David A. Thomas (Skokie, Ill.: National Textbook Company, 1979), pp. 215-219. Austin J. Freely, Argumentation and Debate (Belmont, Calif.: Wadsworth Publishing Company, 1981), pp. 74-109. Maridell Fryar and David A. Thomas, Basic Debate (Skokie, Ill.: National Textbook Company, 1981), pp. 22-34, 197, 200. J. Vernon Jensen, Argumentation Reasoning in Communication (New York: D. Van Nostrand Company, 1981), pp. 107-138. Gerald H. Sanders, "Toward More Effective Use of Evidence in Academic Debate" in Advanced Debate Readings in Theory, Practice and Teaching Ed. David A. Thomas (Skokie, Ill.: National Textbook Company, 1979), pp. 227-238. James Edward Sayer, Argumentation and Debate Principles and Ap plications (Sherman Oaks, Calif.: Alfred Publishing Company, 1980), pp. 95-96, 155-187. J. Michael Sproule, Argument Language and Its Influence (New York: McGraw-Hill Book Company, 1980), pp. 30, 102-141, 387.

[2] Ibid.

[3] For example, see: Freely, Fryar and Thomas.

[4] Nicholas Rescher and Carey B. Joynt, "Evidence in History and in the Law," The Journal of Philosophy, 16 (June 18, 1959), pp. 561-578. Robert P. Newman and Dale R. Newman, Evidence (New York: Houghton Mifflin Company, 1969). Stephen Toulmin, The Uses of Argument (Cambridge: The Cambridge University Press, 1964).

[5] Readers who want a thorough treatment of evidence as it pertains to the court of reason should see: Robert P. Newman and Dale R. Newman, Evidence (Boston: Houghton Mifflin Company, 1969). Readers who want a thorough

treatment of evidence as it pertains to the court of law should see: Edward W. Cleary, McCormick's Handbook of the Law of Evidence (St. Paul: West Publishing Company, 1972). Some of the sub-areas which have been included within the court of reason are: Scholarly Argumentation, Political Argumentation, Religious Argumentation, and Business Argumentation. See: Richard D. Rieke and Malcolm O. Sillars, Argumentation and the Decision Making Process (Glenview: Scott Foresman and Company, 1984). Sub-areas within the court of law might include Administrative Law, Admirality Law, Appellate Law, and, of course, Civil and Criminal Law.

6 While many definitions of truth have been argued, without wishing to enter into the disputes concerning the meaning of the term, I would agree with Oakshott that truth is what the evidence, correctly interpreted, oblidges one to believe. See: Michael B. Oakshott, Experience and Its Modes, (Cambridge: 1933).

Traditionally, ability and willingness to tell the truth are the criteria which historiographers have used in evaluating evidence. These criteria are not so very different from Aristotle's now venerable treatment of the components of ethos as source credibility. See: Aristotle, The Rhetoric of Aristotle translated by Lane Cooper (Englewood Cliffs, New Jersey: 1932), p. 92.

For a more modern treatment of credibility which implicitly utilizes the criteria of ability and willingness to tell the truth the reader should see: Otto Friedrich, "There are 00 Tress in Russia: The Function of Fact in Newsmagazines," Harpers, (October, 1964). For a more modern treatment of credibility which explicitly uses the criteria of ability and willingness to tell the truth, the reader is referred to: Robert P. Newman, "The Weekly Fiction Magazines," The Central States Speech Journal (May, 1966).

7 Hotchkiss v. Newton, 10 Ga. 567; O'Brien v. State, 69 Nev. 691, 96 N.W.

650; Hubbell v. U.S., 15 Ct.Cl. 606; McWilliams v. Rodgers, 56 Ala. 93.

[8] Learns v. Hall, 91 S.E.2d 648, 652, 197 Va.736.

[9] 31 A 591, 594, 65 Con.99, 28 L.R.A. 143, 48 Am.St.Rep. 177.

[10] Henry Campbell Black, Black's Law Dictionary (St. Paul: West Publishing Company, 1968), pp. 1430-1431.

[11] Black, p. 519.

[12] Melvin Belli, My Life on Trial (New York: William Morrow & Company, Inc., 1976), pp. 88-91.

[13] Black, p. 355.

[14] Black, p. 355.

[15] Black, p. 68.

[16] "Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." From: Edward W. Cleary and John W. Strong, Evidence (St. Paul: West Publishing Company, 1975), p. 572.

[17] Hearsay evidence lacks competency for three reasons: (1) it is a secondary source, (2) it is a secondary source filtered through the biases and selective perceptions of a minimum of two people, and (3) there is little that can be done to correct these shortcomings as hearsay evidence cannot be subjected to cross-examination.

[18] The catalogs of law schools are especially revealing regarding this point. For example, in describing the course in legal evidence, the Bulletin of the Wake Forest University School of Law 1981-1982 states: "The rules and standards by which the admission of proof at trial is regulated." (p. 35). Similarly, the University of San Diego School of Law 1981-1983 Bulletin reads: "This course is concerned with the rules which limit the facts, opinions, and things that may be used in proof, and also, with

the rules which govern how they may be evidenced." (p. 40). The University of Notre Dame Law School Bulletin of 1982-1983 states that the evidence course: "Studies the legal principles governing the admissibility of controversial facts in judicial proceedings ..." (p. 18). The 1981-1982 Catalog of Vermont Law School informs the reader that: "The course will consider the rules governing the admissibility of testimonial, physical, documentary, and demonstrative evidence in trials and other formal legal proceedings." (p. 29). The Western New England College School of Law Bulletin 1982-1983 describes the legal evidence course as: "An introduction to the basic rules of the exclusionary system of evidence which govern the proof of disputed propositions of fact in criminal and civil trials." (p. 60).

19 C. A. Wash., 180 F 2d 781, 783.

20 In this instance, such a gun might be referred to as a "Miami device."

21 Robert P. Newman, The Denver Lecture Series, "The Future of the Interface", sponsored by The Department of Speech Communication of the University of Denver, 1975. Available from The Speech Communication Association, Number 858.

22 For example, see: Michael W. Patrick, "Toward a Codification of the Law of Evidence in North Carolina," Wake Forest Law Review 16 (October, 1980), 669-709.

23 For example, see: 1981 Edition Federal Rules Criminal Procedure Evidence Appellate Procedure (St. Paul, Minn.: West Publishing Company, 1981), p. 169. (Hereinafter referred to as Federal Rules). It states in part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." It is up

to the judge(s) to do the excluding and to make the value judgments pertaining thereunto.

[24] For example, see: Federal Rules, pp. 161-162. Melinda Beck, "Footnote to the Holocaust," Newsweek (October 19, 1981), 73.

[25] For an analysis of a criminal trial in which the jurors were called upon to render both deliberative and forensic judgments, see: Vivian I. Dicks, "Courtroon Rhetorical Strategies: Forensic and Deliberative Perspectives," The Quarterly Journal of Speech 67 (May, 1981), 178-192. The article examines the Angela Davis trial in which Ms. Davis was charged with kidnapping, murder, and conspiracy.

[26] 347 U.S. 493 (1954) and 349 U.S. 294 (1955).

[27] 367 U.S. 643 (1961).

[28] 369 U.S. 186 (1962).

[29] 372 U.S. 335 (1963).

[30] 378 U.S. 478 (1964).

[31] 379 U.S. 294 (1964).

[32] 381 U.S. 479 (1965).

[33] 384 U.S. 436 (1966).

[34] 403 U.S. 713 (1971)(per curiam).

[35] 410 U.S. 113 (1973).

[36] 410 U.S. 179 (1973).

[37] 418 U.S. 683, 692 (1974).

[38] For a readable, if popularized, analysis of the policy role in appellate litigation see: Bob Woodward and Scott Armstrong, The Brethren (New York: Avon Books, 1979). For a more scholarly treatment, see: Richard Neely, How Courts Govern America (New Haven: Yale University Press, 1981). Harold J.

Spaeth, "Computer 9, Supreme Court 0," Barrister 9 (Spring, 1982), 8-11, 37.

39 For reasons which will become readily apparent, this trial rapidly became known as the case of "sex for Proffitt."

40 Donald W. Patterson, "Half of Jurors in Proffitt Trial Say State Failed to Prove Case," Greensboro News and Record Wednesday, March 26, 1986, p.1.

41 Ed. Williams, "Jury Acquits; Sheriff Proffitt Vows Better Job," Greensboro News and Record Wednesday, March 26, 1986, p.1.

42 See, especially, the editorial by Giles Lambertson in the Greensboro News and Record Friday, March 28, 1986, p. A13. See also: Greensboro News and Record Saturday, May 3, 1986, p. D1, D4. In response to the news coverage of this trial, Proffitt leveled a two million dollar libel suit.

43 C. Wright Mills, The Sociological Imagination (New York: Oxford University Press, 1959), p. 77.